

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE POLLUTION CONTROL AGENCY

In the Matter of Administrative Penalty
Order Issued to R&R Excavating, Inc.

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Beverly Jones Heydinger ("ALJ") on April 1, 2003, pursuant to a Notice of and Order for Hearing dated March 10, 2003. The hearing was held at the Pollution Control Agency, 520 Lafayette Road, Saint Paul, MN. There were no post-hearing submissions by the parties.

Stephanie Morgan, Assistant Attorney General, Suite 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55155-4199, appeared on behalf of the Pollution Control Agency ("Agency" or "PCA"). Brent Reiner appeared on behalf of the Respondent, R&R Excavating, Inc. ("R&R").

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Pollution Control Agency will make the final decision after reviewing the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 116.072, subd. 6(e), the Commissioner's decision shall not be made until this Report has been available to the parties to the proceeding for at least five (5) days. Parties should contact Sheryl Corrigan, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Rd., St. Paul, MN 55155, telephone (651) 296-7301 to ascertain the procedure for filing exceptions.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUE

1. Did the Respondent fail to notify the PCA of its intention to conduct a demolition?
2. Did the Respondent fail to thoroughly inspect the barn ("facility") at Second Avenue and Michigan Avenue in the City of Hutchinson ("City"), Minnesota, prior to demolishing it?
3. Did the Respondent fail to remove all regulated asbestos-containing material (RACM) before conducting any activity that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal?
4. Did Respondent fail to ensure that removed RACM remained adequately wet until properly prepared for disposal?
5. Did Respondent fail to have on site a representative trained in the provisions of 40 C.F.R. § 61.145?
6. Did respondent fail to adequately wet RACM – not removed before demolition – after the demolition and keep it wet during handling and transport to the disposal site?
7. Did Respondent fail to take the RACM to an approved landfill?
8. Did Respondent fail to maintain waste-shipment records for all RACM transferred off the facility site?

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On March 30, 2001, R&R submitted to the City an estimate for the demolition and disposal of a barn and outbuildings on city property located at Second Avenue and Michigan Street. The quote included "all demolition and footing removal" and specified that "[a]ll materials will be disposed of in a licensed demolition landfill." ^[1]
2. R&R was awarded the contract and demolished the facility. The City paid R&R \$19,295.97 on December 28, 2001. ^[2]
3. On June 19, 2001, the PCA received a complaint that the facility was being demolished. Jackie Deneen at the PCA checked the PCA database and

determined that the Agency had not received notice of R&R's intent to demolish the site.^[3]

4. Jackie Deneen is the Administrator for Asbestos and Demolition Programs at the PCA. In this position she inspects asbestos removal projects and demolitions. She also handles follow-up enforcement action if violations are observed. Prior to holding this position, she worked for the PCA in various areas including solid waste, closed landfills, air quality, and open burning.^[4]

5. Ms. Deneen has a B.S. in biology from the University of Minnesota. She also completed specialized training as a site supervisor for asbestos.^[5] Five to six times a year, she gives training workshops on demolition projects and asbestos projects to private and government contractors across the state. She has worked at the PCA as an inspector for fourteen years. She has done over two hundred asbestos inspections in this capacity.^[6]

6. On June 20, 2001, PCA staff, led by Ms. Deneen, inspected the facility. When they arrived on site, the demolition was complete and 95% of the building had been hauled away. Kurt Reimer of R&R was operating a backhoe, filling a Hansen Gravel dump truck with debris. Also, a second Hansen Gravel truck was driving away from the site, filled with uncovered debris.^[7] The debris was being hauled to Hansen Demolition Landfill (Landfill), whose permit specifically prohibits the Landfill from accepting asbestos waste.^[8]

7. PCA staff observed the site and documented dry and broken transite debris^[9] as well as suspect floor tile (adhered to concrete).^[10] They took and retained samples of each.^[11]

8. Asbestos is a naturally occurring mineral that separates into strong, very fine fibers. Because asbestos fibers are heat-resistant and durable, asbestos was used frequently in construction. During demolition, any asbestos contained in a building may become airborne.^[12]

9. Asbestos is a known carcinogen. Airborne asbestos fibers are easily breathed into the lungs, and may cause serious health problems. There is no safe level of human exposure.^[13]

10. Removal of asbestos is carefully regulated to assure the safety of the persons conducting the removal, and to prevent asbestos contamination of the environment and persons who may come in contact with it. Wetting the material is the best way to prevent the asbestos fibers from becoming airborne and being inhaled. To minimize the risk, asbestos-containing materials must be kept wet during removal and collection, and sealed into a leak-proof container while wet.^[14]

11. During the PCA inspection, Lenny Rutledge, Building Inspector from the City of Hutchinson (City), and Ron Hansen, the Landfill owner, arrived on site. MPCA

staff informed the City, Company, and the Landfill that the waste material in the truck must remain at the facility as potentially asbestos-containing material and be handled appropriately (wetted, covered and hauled to an approved landfill). No water was on site and none was immediately available.^[15]

12. The backhoe operator placed clean soil on the debris in the truck and hauled it to the Hansen Gravel Shop, where it was wetted down and returned to the demolition site.^[16]

13. Later that same day, June 20, 2001, Ms. Deneen turned over the samples of transite and floor tile that she had collected to Braun Intertec Corp., for testing.^[17]

14. On June 26, 2001, the City completed a "Notification of Asbestos Related Work" containing an emissions control plan.^[18] It was prepared in response to the PCA's stop order.

15. On June 27, 2001, Braun Intertec Corp. notified the PCA that the samples contained asbestos.^[19]

16. On July 10, 2001, the City submitted an amended notification for further work on the project.^[20]

17. On May 14, 2002, after using the Administrative Penalty Order Penalty Calculation Worksheet^[21] to calculate R&R's penalty, the PCA issued an Administrative Penalty Order to R&R, assessing a nonforgivable penalty of \$7500. The Order also required R&R to submit a detailed plan for compliance with federal regulations governing asbestos on future demolitions, a statement certifying that R&R personnel had read and would comply with the regulations, and a list of all demolitions R&R had conducted in the past 12 months. The Order notified R&R of its right to seek a hearing or review of the decision.^[22]

18. On June 14, 2002, R&R appealed the Order. R&R also noted that: a) the City of Hutchinson, when it hired R&R, told R&R that it had "everything in order for this removal"; and, b) R&R does not understand the laws PCA references in the Order and cannot afford an attorney.^[23] This was reiterated by Brent Reiner, President of R&R, at the hearing.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Pollution Control Agency are authorized to consider the violations against Respondent under Minn. Stat. §§116.072 and 14.50 (2002).

2. Respondent received due, proper and timely notice of the violations and of the time and place of the hearing. This matter is, therefore, properly before the Agency and the Administrative Law Judge.

3. The Agency has complied with all relevant substantive and procedural legal requirements.

4. The Code of Federal Regulations, title 40, part 61, subpart M, as amended, entitled "National Emission Standard for Asbestos", is incorporated by reference into Minnesota Rules 7011.9920.

5. The Agency has shown by a preponderance of the evidence that R&R violated 40 CFR § 61.145 (b)(1) when it failed to notify the PCA of its intention to conduct a demolition.

6. The Agency has shown by a preponderance of the evidence that R&R violated 40 CFR § 61.145 (a)(1) when it failed to thoroughly inspect the facility prior to demolishing it.

7. The Agency has shown by a preponderance of the evidence that R&R violated 40 CFR § 61.145 (c)(1) when it failed to remove all RACM before conducting any activity that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal.

8. The Agency has shown by a preponderance of the evidence that R&R violated 40 CFR § 61.145 (c)(6)(i) when it failed to ensure that removed RACM remained adequately wet until properly prepared for disposal.

9. The Agency has shown by a preponderance of the evidence that R&R violated 40 CFR § 61.145 (c)(8) when it failed to have on site a representative trained in the provisions of 40 C.F.R. § 61.145.

10. The Agency has shown by a preponderance of the evidence that R&R violated 40 CFR § 61.150 (a)(3) when it failed to adequately wet RACM – not removed before demolition – after the demolition and keep it wet during handling and transport to the disposal site.

11. The Agency has shown by a preponderance of the evidence that R&R violated 40 CFR § 61.150 (b)(1) when it failed to take the RACM to an approved landfill.

12. The Agency has shown by a preponderance of the evidence that R&R violated 40 CFR § 61.150 (d)(1) when it failed to maintain waste-shipment records for all RACM transferred off the facility site.

13. Based on the factors set forth in Minn. Stat. § 116.072, subd. 2, the amount of the penalty is not unreasonable.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Commissioner of the Pollution Control Agency uphold the penalty against Respondent, R&R Excavating, Inc.

Dated this 29th day of April, 2003.

S/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Tape-recorded (two tapes)

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The PCA has the burden of proving by a preponderance of the evidence a basis for the \$7500 penalty assessed against R&R.^[24] The Agency has met this burden. At the hearing on April 1, 2003, the PCA clearly established a factual basis for the penalty. In his defense of R&R, Brent Reiner did not dispute the facts as presented by the PCA. Instead, he emphasized the following points:

- R&R has no prior offenses;
- R&R had no intention of violating the asbestos regulations;
- R&R assumed that the City had taken care of any environmental issues regarding the demolition;
- R&R cannot afford to pay the penalty or hire a lawyer; and
- R&R had no knowledge of the laws and a small company is unlikely to know about the asbestos regulations.

However, the PCA correctly notes that the regulations impose strict liability upon owners and operators of demolition operations^[25], and ignorance of the law is not a defense. Furthermore, the penalty assessed was restrained and reasonable according to the Administrative Penalty Order Penalty Calculation Worksheet.

The Agency was acting within its discretion in determining the penalty. It is not unreasonable. However, the Agency may choose to reduce the penalty to the \$5000 minimum for a serious violation or negotiate payment terms because of R&R's undisputed lack of willfulness or past violations, considerations specifically mentioned as relevant to the penalty determination in Minn. Stat. § 116.072, subd. 2. In addition R&R immediately cooperated with the PCA and the City when notified of the violations.

B.J.H.

^[1] Ex. 5.

^[2] Ex. 7.

^[3] Testimony of Jackie Deneen.

^[4] Id.

^[5] This was a five-day course in November 1999 on identifying work practices for asbestos reporting.

^[6] Testimony of Jackie Deneen.

^[7] Testimony of Jackie Deneen; Ex. 8 § XIII (MPCA Asbestos Demolition & Renovation Inspection Field Data Collection Checklist).

^[8] Ex. 12, Part II.A.

^[9] Ex. 3, photograph.

^[10] Ex. 4, photograph.

^[11] Testimony of Jackie Deneen; Ex. 8 §§ XII and XIII.

^[12] Testimony of Jackie Deneen.

^[13] Id.

^[14] Id.

^[15] Id.; Ex. 8, § XIII.

^[16] Id.

^[17] Id.; Ex. 9.

^[18] Ex. 11.

^[19] Ex. 10.

^[20] Ex. 11, Amended Notification of Asbestos Related Work (July 10, 2001).

^[21] Ex. 14.

^[22] Ex. 13.

^[23] Letter from Brent Reiner, President, R&R Excavating, Inc., to Jacqueline M. Deneen, Asbestos Program Coordinator, MPCA (June 14, 2002), Ex. B to Notice of and Order for Hearing.

^[24] Minn. R. pt. 1400.8608

^[25] 40 C.F.R. § 61.150 (2003).